* **THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

+ WRIT PETITION NO. 36073 OF 1998

% 04.04.2007

H. Rajender

….. Petitioner

Vs.

1. $ The Managing Director, The Hyderabad Agricultural Co-operative Association Limited, HACA Havan, Hyderabad – 500 004 and another.

….Respondents.

! Counsel for the Petitioner: Sri T.V.V.S. Murthy

^ Counsel for the Respondent-society: Sri G. Bhaskar

< Gist:

>Head Note

? Citations:

[1] 1996(1) SLR 762

2 1986 ALT Short Notes 30 – judgment in W.P.14119 of 1984 dated 22.11.1985

3 2002 Delhi Law Times 435

4 (2002)5 SCC 111

5 (2005)4 SCC 649

6 (2006) 8 SCC 212

7 (1999)7 SCC 209

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO. 36073 OF 1998

ORDER:

The petitioner, a junior Assistant in the Hyderabad Agricultural Cooperative Association Limited, (herein after referred to as HACA), seeks promotion as a senior assistant, with retrospective effect from 14.12.1994, against the backlog vacancies reserved in favour of the scheduled castes, contending that the respondent – Society had failed to comply with the rule of reservation and had kept four posts of senior assistants, reserved in favour of the scheduled castes, unfilled despite qualified and eligible junior assistants, in the scheduled castes category, being available for being considered for promotion to these posts.

Facts, in brief, are that on the petitioner's name being sponsored by the employment exchange, he was considered for selection and was appointed, vide proceedings 6.6.1988, as a junior assistant in HACA with effect from 10.6.1988. Petitioner is a graduate, having obtained his B.Com. degree from Osmania University in May, 1983, and belongs to the scheduled caste category. He claims to have put in about 10 years of service as a junior assistant, to have worked in all sections such as the business counter, accounts and audit, administration etc., and to have worked in the Adilabad Branch of HACA for one year. The

1st respondent, vide memo dated 14.12.1994, promoted seven junior assistants, (six from the OC category and one from the B.C. category), as senior assistants with effect from 14.12.1994 stipulating that they should get themselves qualified and acquire a junior diploma in cooperative management (JDC) or a higher diploma in cooperative management (HDC) within three years of their promotion. Petitioner would claim that, while these seven promotees were matriculates, and not graduates, he was not promoted as a senior assistant though he had put in much more than the requisite service of 5 years, had worked in all the wings, possessed a bachelor's degree in commerce and belonged to the scheduled caste category. Petitioner would contend that, out of the 16 posts of senior assistants, (including the seven posts for which promotions were effected in December, 1994), there was not even a single person from the scheduled castes and that the 1st respondent had failed to provide reservation, in favour of the scheduled castes, in promotion to the posts of senior assistants despite repeated instructions from the State Government to fill up backlog vacancies reserved in their favour. Petitioner would submit that he was deputed to undergo training for HDC in the Institute of Cooperative Management, Rajendranagar, Hyderabad from 6.6.1997 to 4.12.1997, that he was awarded Higher Diploma in Cooperative Management by the Institute of Cooperative Management, in its proceedings dated 2.7.1998, and that he had passed the diploma in first class. Petitioner would submit that Rule 1(d), under the second category of posts in Chapter II of the HACA Service Regulations, relates to the posts of senior

assistants and that Rule 4, under Chapter II, provides that the rule of reservation, as specified from time to time by the government, shall be applicable for making direct recruitment. Petitioner would also refer to Rule 1(h) which provides that other terms like the period of service, the period of duty, pay, shall carry the same meaning, emoluments etc., as in the case of State government employees service rules unless otherwise expressly defined under the Rules. Petitioner would submit that he was placed under suspension from 29.11.1989 to 21.01.1990 for one month and 23 days and was imposed the minor penalty of censure and recovery, vide proceedings dated 19.01.1990, on the ground that there was shortage of stock of Rs.14,338-15, and that the entire amount was recovered from the petitioner in instalments till the end of August, 1991. Petitioner would contend that the minor penalty of censure is not be a bar for promotion nor did imposition of such a penalty necessitate his promotion being deferred. Petitioner would submit that, in any event, the rigour period of the minor penalty expired by August, 1991 when the entire amount was recovered and that he was eligible for being considered for promotion as a senior assistant thereafter. According to the petitioner, the action of the respondents in denying him promotion to the post of senior assistant in December, 1994 was arbitrary and illegal. Petitioner would submit that the Managing Director had endorsed, on the petitioner's representation dated 23.3.2006 that he deserved promotion and had recommended his case, that he had subsequently acquired HDCM qualification in July, 1998 and while the Person-in-charge committee, which corresponds to the

Departmental Promotion Committee, met on several occasions in 1998, he was not considered for promotion to the post of senior assistant.

In the counter affidavit, filed by the 1st respondent–society, it is stated that the 1st respondent–society was established under the Multi-State Cooperative Societies Act and was an apex premier cooperative society serving the farming community in the Nizam area which consists of Telangana and parts of Karnataka and Maharashtra and that the society is under the administrative control of the State Government. Respondents would contend that the writ petition is not maintainable as the respondent–society is an autonomous body and is not a "State" under Article 12 of the Constitution of India. Respondents would state that the petitioner has an alternate remedy under the Multi State Cooperative Societies Act, as the Act provides for adjudication of disputes between the society and its employees, and since the petitioner had not exhausted the alternative remedies available to him, the writ petition is liable to be dismissed. It is also stated that the post, to which the petitioner was seeking promotion, was a selection post, that there was no clear vacancy, that the issue of promoting the petitioner as a senior assistant was still under consideration of the management, that his case had not been rejected and that the present writ petition was premature. Respondents would submit that the petitioner was suspended in the year 1989. According to the respondents the seven junior assistants, who were promoted in the year 1994, were senior to the petitioner in the cadre of junior assistants and that the

petitioner was neither by-passed nor overlooked for promotion. It is stated that though the order of suspension was revoked, since the period of suspension was held as not to count for earn leave or increments as he was not eligible for any emoluments other than subsistence allowance during the period of suspension and his conduct was censured, it could not be said that the suspension period was not a penalty. Respondents would also submit that the petitioner was directed to repay the deficit amount within 12 months and as such he was not considered for promotion along with the other seven candidates who were promoted in December, 1994. Respondents would submit that the HACA service Rules do not provide for reservation in promotion, that seven junior assistants were promoted as per their seniority, that the cadre strength of senior assistants is 16 and in the 16 posts of senior assistants five employees were working, and as four posts were earmarked to be filled up by direct recruitment of SC and ST candidates, the remaining seven posts of senior assistants were filled up by promotion of eligible junior assistants strictly in accordance with their seniority. It is stated that the respondent society maintains a roster and that promotion to the post of senior assistant in the year 1994 was made strictly in the order of seniority of the eligible junior assistants and persons, who were senior to the petitioner, were alone given promotion. Respondents would submit that service of five years, as prescribed in the Service Rules for promotion to the post of senior assistant, was only the minimum prescribed qualifying service to be eligible for promotion and a person who had put in this prescribed service

was not automatically entitled to be promoted as a senior assistant. Respondents would further submit that completion of HDCM course did not confer any right on the petitioner to claim promotion. According to the respondents, the HACA Service Rules provided for reservation in appointments only by way of direct recruitment, that there was no connection between the petitioner's promotion and the previous disciplinary proceedings except that this aspect would be considered by the DPC at the time of screening of candidates as a parameter to assess their past performance and that such a stage had not yet come. It stated that there is no vacancy in the post of Senior Assistant under the promotees quota.

In his rejoinder, the petitioner would state that the respondent-society is an instrumentality of the State under Article 12. Petitioner would contend that, since the 1st respondent issued a notification in 1996 to fill up the posts of senior assistants by direct recruitment of SC/ST candidates, it could not be said that there was no clear vacancy and that the punishment of censure, and recovery of Rs.14338-15, imposed on the petitioner by the 1st respondent on 19.1.1990, was not a bar for his promotion on 14.12.1994 when seven others were promoted. Petitioner would contend that the adverse remarks in his annual confidential reports, if any, after imposition of the penalty on 19.1.1990 could not be taken into consideration for the purpose of depriving him of promotion as these adverse remarks were never communicated to him. Reliance is placed on Rule 1(h) of the HACA Employees Service Regulations to contend that the rule of reservation in

favour of SC/STs is to be followed in respect of HACA employees not only for direct recruitment but also for promotion. Petitioner would contend that, if a roster had been maintained, he would have been entitled for promotion on 14.12.1994 when seven other employees were promoted as senior assistants and that there was not even a single scheduled caste candidate among the 12 senior assistants working in the respondent society. Petitioner would contend that there is no separate quota for direct recruitment and promotion and that the four posts, earmarked for being filled up by SC/STs by way of direct recruitment, should be made available for promotion from the scheduled caste junior assistants category.

In his additional affidavit dated 15.1.1994 the petitioner would state that HACA is an apex cooperative organization formed and registered in the erstwhile Hyderabad State in the year 1949, that it became a Multi State Cooperative Society in the year 1980, that the State Government had invested about 62% of the share capital of HACA and that, from out of the total share capital of Rs.11,33,156/-, the Government held shares of Rs.7.00 lakhs. Besides the share capital, the State Government was granting financial aid by giving loans to HACA for Rs.2.31 Crores, that HACA is required to have a full time Managing Director, that an employee of the State Government, from the Cooperative Department not below the rank of a Joint Registrar of Cooperative Societies, is required to be appointed as the Managing Director and that the General Manager of HACA is appointed from the A.P. Agricultural University or the Agriculture Department of the State Government not below the cadre of Associate Professor or Special

Cadre Deputy Registrar. It is also stated that the State Government has the power to nominate Directors to the Board of Directors of HACA. Petitioner would contend that the respondent is an instrumentality of the State under Article 12 of the Constitution of India and that the writ petition, as filed, is maintainable.

The petitioner also filed an additional affidavit dated 21.12.2006 giving details of the service rendered by him in various branches of HACA. He would submit that he satisfies the conditions prescribed in Rule 1(d) of HACA employees Service Rules for being promoted to the post of senior assistant, that he satisfies the eligibility criteria for promotion as a senior assistant and that his name was considered by the Person-In-Charge Committee (DPC) in its meeting held on 23.9.1994 as the petitioner had completed the minimum five years of service, but his promotion was deferred on the ground that he was imposed the punishment of censure on 19.1.1990. Petitioner would contend that the punishment of censure imposed on him on 19.1.1990 was not a bar for his being considered for promotion either on 23.9.1994 or when others were promoted shortly thereafter. Petitioner would emphasise that not even a single senior assistant in HACA was directly recruited and that the petitioner has been deliberately discriminated against in being denied promotion as a senior assistant.

In their reply to the addition affidavit, respondents would state that the petitioner has an alternate remedy under Section 47 of the A.P. Shops and Establishment Act, that the powers of the

general body of the society are wide and include the power to amend or repeal any of the service rules, that as per the byelaws of HACA its business activities cannot be termed as functions of public importance closely related to governmental functions and that HACA is not engaged in any activity which is akin to State activity nor does it discharge any public duty or public operations performed by any government agency, that HACA does not enjoy any monopoly status and that no subsidy is given to HACA by the government. It is further stated that no Government department was transferred to HACA and as such HACA is neither a State nor an instrumentality or agency of the Government. It is stated that the Government does not exercise deep and pervasive control over HACA, that the ultimate power vests with the general body under Clause 29 of the byelaws of the Society and the Committee constituted as per Clause 47 of the byelaws, and that HACA cannot be considered a State or other authority within the meaning of Article 12 of the Constitution of India. According to the respondents, it is not mandatory for them to provide reservation in promotion and that the respondent-society has not violated the rule of reservation in not providing for reservation in promotions in favour of the scheduled castes and the scheduled tribes. It is stated that the four posts in the senior assistants cadre, reserved in favour of the scheduled castes and the scheduled tribes, are required to be filled by way of direct recruitment and not by promotion. It is stated that, while the earlier promotions were made in 1994, no promotions have been effected subsequent thereto and that the petitioner's turn had not yet come. It is stated

that it was only after promotions were effected in 1994 was Clause 4(a) inserted in Article 16 of the Constitution of India by a Constitutional Amendment on 17.6.1995 and that, in effecting promotions on 4.12.1994, the respondent had not violated the rule of reservation. It is stated that on 7.3.1996 the respondent had sought to fill up the four backlog vacancies of senior assistants by direct recruitment and that, from out of these four backlog vacancies, three were reserved in favour of the scheduled castes and one for the scheduled tribes. It stated that these vacancies could not be filled up as HACA was continuously running in losses and that the petitioner's case for promotion could not be considered as there was no scope for future promotion of senior assistants as all the 12 posts in the promotion quota had already been filled up. It is stated that the remaining four posts are required to be filled up with eligible candidates by way of direct recruitment and not by promotion, that while the Public Enterprises Department of the State Government had initially recommended liquidation of HACA, it had subsequently recommended three options (i) HACA should repay the government share capital of Rs.7.00 lakhs (ii) should discuss with NCDC and arrange to release government guarantee and (iii) HACA should submit proposals for VRS to its 32 employees. It is stated that the group of Ministers, appointed for taking a decision on State Public Sector Undertakings and other institutions like HACA, had also examined the matter and had recommended for VRS being extended to 24 employees of HACA and that, in such circumstances, HACA had not taken up further promotions or direct recruitment.

Sri T.V.V.S. Murthy, learned counsel for the petitioner, would submit that failure on the part of the respondents to provide reservation in promotion, in favour of the scheduled castes, violated the rule of reservation and the protection conferred on the scheduled castes under the Constitution. Learned counsel would submit that Rule 4, which requires the respondents to follow the rule of reservation, as applicable to state government employees by direct recruitment, would automatically apply for promotions also. Learned counsel would place reliance on **The Commissioner of Commercial Taxes, Andhra Pradesh Vs. G. Sethumadhava Rao**[1] in this regard. Learned counsel would submit that the respondent – society is an instrumentality of the State and, since it is required to follow similar rules as are applicable to the state government, it is duty bound to provide reservation in favour of the scheduled castes and scheduled tribes while effecting promotions also. Learned counsel would place reliance on G.O.Ms. No. 5 dated 14.2.2003 wherein the state government provided for reservation, in promotion, in favour of the scheduled castes and the scheduled tribes.

Sri G. Bhaskar, learned counsel for the respondent–society, would submit that the writ petition as filed is not maintainable. Learned counsel would place reliance on the judgments of this Court in **T. Narasimha Reddy Vs. The Managing Director A.P State Cooperative Marketing Federation**[2] and the Delhi High Court in **R.K. Mishra Vs. Krishak Bharati Cooperative Limited**[3] in this regard. Learned counsel would submit that the

petitioner has an effective alternative remedy under the provisions of the Multi-State Co-operative Societies Act and the A.P. Shops and Establishment Act, that the service rules of the Respondent–Society requires the rule of reservation, as applicable to government employees, to be provided only in matters of direct recruitment and that the said rule had no application for effecting promotions. Learned Counsel would submit that, since the respondent–society is not duty bound to provide reservation in promotions, as it is not the case of the petitioner that any person junior to him was promoted as a senior assistant and since four posts in the senior assistants cadre, reserved in favour of the scheduled castes, are to be filled up only by way of direct recruitment and not by promotion, the question of considering the petitioner's case for promotion to the post of senior assistant, treating the post as being reserved to be filled up by promotion, from amongst candidates belonging to the scheduled castes, does not arise.

The HACA Employees Service Rules apply to all employees of HACA. Under the proviso to Rule 1(h), of Chapter II, of the Service Regulations, other terms like the period of service, period of duty, pay, emoluments, special pay etc., shall carry the same meaning as in the case of the state government employees service rules unless otherwise expressly defined in the HACA Rules. Rule (ii) relates to category of posts and under clause (1) (d) thereof Branch Managers/Senior Assistants shall be appointed by promotion from amongst regular junior assistants/typists/stenos, with JDC or HDC, who have put in at

least 5 years of regular service as junior assistant/typist/stenos of which not less than 2 years of service shall be in the accounts wing, one year in audit and one year in departmental stores and for promotion from the junior assistants cadre to the Senior Assistants cadre merit cum seniority is the criteria prescribed. Rule 4 provides that the rule of reservation, as specified from time to time by the state government, shall be applicable for making direct recruitment.

For a body to be considered a "State", within the meaning of Article 12, the question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found, then the body is a State within the meaning of Article 12. On the other hand, when the control is merely regulatory, whether under a statute or otherwise, it would not serve to make the body a "State". (**Pradeep Kumar Biswas Vs. Indian Institute Of Chemical Biology**[4]**; Zee Telefilms Ltd Vs. Union of India**[5])

The undisputed facts in the present case are that the Government of Andhra Pradesh holds 62% of the share capital of Hyderabad Agricultural Cooperative Association Limited (HACA) i.e. Rs.7.00 lakhs from out of the total share capital of Rs.11,33,156-00. The State Government has been providing financial aid by giving loans to HACA of more than Rs.2.31 Crores. The Managing Director of HACA is an employee of the

State Government from the Cooperative Department not below the rank of Joint Registrar of Cooperative Societies and its General Manager is to be appointed either from the A.P. Agricultural University or the Agriculture Department of the Government of A.P. not below the cadre of an Associate Professor or a Special Cadre Deputy Registrar. Under the bye-laws, the State Government has been conferred the power to nominate Directors to the Board of HACA. These facts would establish that HACA is financially and administratively under the control of the Government of Andhra Pradesh and such control is not merely regulatory. As the tests prescribed in **Pradeep Kumar Biswas**[4], to determine whether HACA should be considered a State within the meaning of Article 12, are satisfied, and as HACA is a "State" within the meaning of Article 12, a writ petition filed thereagainst is maintainable. In **T. Narasimha Reddy**[2] a Single Judge of this Court held that the A.P. State Cooperative Marketing Federation is an instrumentality or agency of the State Government and is an authority within the meaning of Article 12 of the Constitution of India. In **R.K. Mishra**[3], a Single Judge of the Delhi High Court held that M/s. Krishak Bharati Cooperative Limited, a society registered under the Multi-state Cooperative Societies Act, 1984, was not a "State" within the meaning of Article 12 of the Constitution of India, and that the State Government did not exercise deep and pervasive control over M/s Krishak Bharati Cooperative Limited as it did not control the actual day to day working of the society. The judgment of the Supreme Court in **Pradeep Kumar Biswas**[4] is subsequent to the judgment of the

Delhi High Court in **R.K. Mishra**[3]. Further, as held in **Pradeep Kumar Biswas**[4], each case has to be examined in the light of the cumulative facts established whether the body is financially, functionally and administratively dominated by or is under the control of the Government. The mere fact that, in **R.K. Mishra**[3], M/s Krishak Bharati Cooperative Limited was held as not to be financially, functionally and administratively under the control of the government, would not automatically necessitate it being held that HACA is also not an instrumentality of the State under Article 12 of the Constitution of India. Reliance placed on **R.K. Mishra**[3] is, therefore, of no avail.

Sri G. Bhaskar, learned counsel for the respondent, would contend that the petitioner has an effective alternative remedy both under the provisions of the Multi-State Co-operative Societies Act and the A.P. Shops and Establishment Act. The questions which arises for consideration, in the present writ petition, whether the respondents were justified in keeping the backlog vacancies, earmarked for the scheduled castes, unfilled for nearly a decade and a half and in not considering the available and eligible junior assistants, belonging to the scheduled castes, for promotion on the ground that the service rules do not provide for reservation in promotion, cannot be examined or adjudicated by the authority either under the Multi-State Co-operative Societies Act or the A.P. Shops and Establishments Act. I see no reason, therefore, to non-suit the petitioner on the ground of alternate remedy.

Despite its avowed attempts of ensuring adequate

representation for the scheduled castes, the fact remains that in the entire cadre of senior assistants in HACA there is not even a single member of the scheduled castes. Even according to the respondents, ever since 14.12.1994, when 7 Junior Assistants (6 from O.C. and 1 from B.C.) were promoted as senior assistants, four posts of senior assistants reserved in favour of the scheduled castes/scheduled tribes remain unfilled. Respondents would contend that these posts, which represent the backlog vacancies reserved in favour of the scheduled castes and the scheduled tribes, are required to be filled in by direct recruitment. It is their case that despite repeated efforts these posts could not be filled up by way of direct recruitment and that, as at present, the financial position of HACA is such that there is no need to fill up these posts. Proclamation of pious intentions apart, the respondents have done little, for the past more than 12 years, to fill up vacancies in the posts of senior assistants earmarked in favour of the scheduled castes and the scheduled tribes. It is their case that, since these earmarked four posts are to be filled up only by direct recruitment, the petitioner, a junior assistant from the scheduled caste category, is not entitled to be considered since the service rules of the respondent society do not provide for reservation in promotion. On the one hand the respondents, on their own showing, have not been able to fill up the four posts of senior assistants, reserved in favour of the scheduled castes and the scheduled tribes, by way of direct recruitment and on the other, despite a person belonging to the scheduled caste category being eligible and available for promotion, they have not chosen to

appoint him to even one of these four posts of senior assistants on the specious plea that the respondent society does not specifically provide for reservation in promotion. Their contention, in effect, is that, since Article 16(4-A) is an enabling provision, it is for HACA to decide as to whether reservation should be provided in promotion and that no mandamus can be issued by this Court compelling them to do so.

In this context it is necessary to note that Article 16(4-A) provides that nothing in Article 16 shall prevent the State from making any provision in reservation, in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the scheduled castes and the scheduled tribes which, in the opinion of the State, are not adequately represented in the services under the State. Article 46, under Part IV of the Constitution, relates to promotion of the educational and economic interests of the scheduled castes and scheduled tribes and other weaker sections and, thereunder, the State shall promote, with special care, the educational and economic interests of the weaker sections of the people and, in particular, of the scheduled castes and scheduled tribes and shall protect them from social injustice and all forms of exploitation. Article 335 provides that the claims of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistent with the maintenance of efficiency of administration, in the making of appointments to services in connection with the affairs of the Union or of a State. The aforesaid provisions of the Constitution emphasize the need to

protect the interests of the scheduled castes, (the most backward of the backward classes), in matters relating to appointment to services and posts in connection with the affairs of the State.

Rule 22 of the A.P. State and Subordinate Service Rules, prior to its amendment under G.O.Ms.No.123 dated 19.4.2003 with effect from 14.2.2003, provided for reservation in favour of the scheduled castes and the scheduled tribes, for appointment to a service, class or category, by direct recruitment. Rule 4 of the HACA Employees Service Rules provides that the rule of reservation as specified, from time to time, by the state government shall be applicable for making direct recruitment. These rules were made long prior to the introduction of Article 16(4-A) by the 85th amendment to the Constitution. The State Government, in G.O.Ms.No.5, Social Welfare (SW.ROR.1) Department dated 14.2.2003, taking note of the 85th amendment to the Constitution, decided to implement the rule of reservation in promotion to ensure adequate representation of the scheduled caste and the scheduled tribe employees i.e., 15% and 6% respectively in all categories of posts in all departments. Consequent thereto, vide G.O.Ms.No.123 dated 19.4.2003, Rule 22 of the A.P. State and Subordinate Service Rules was amended with retrospective effect from 14.2.2003 to include reservation in promotion also.

Would amendment of Rule 22 of the State and Subordinate Service Rules, prescribing reservation in favour of the scheduled castes even in matters of promotion, automatically apply to

employees of HACA without necessary amendment being made to the HACA Service Rules? While Sri T.V.S. Murthy, learned counsel for the petitioner, would assert that such would be the position, Sri G. Bhaskar, learned counsel for the respondent, would contend to the contrary and submit that, since Article 16(4-A) is an enabling provision, unless HACA makes necessary amendments to its rules and specifically provides for reservation in matters of promotion, the petitioner cannot, as a matter of right, claim that a specific provision should be made for application of the rule of reservation in matters of promotion or that a mandamus should be issued by this Court directing HACA to consider his case for promotion to fill up the unfilled posts of senior assistants reserved in favour of the scheduled castes.

In **G. Sethumadhava Rao**[1], a three Judge Bench of the Supreme Court observed:-

"…..In *G.M., S. Rly.* v. *Rangachari: (1962 (2) SCR 586)*, the Constitution Bench per majority had held that the matters relating to employment cannot mean merely matters prior to the act of appointment nor can appointment to an office mean merely the initial appointment but must include all matters relating to employment whether prior or subsequent to the employment that are either incidental to such employment or form part of its terms and conditions and also include promotion to a selection post. This principle was reiterated by a Bench of seven Judges of this Court in *State of Kerala* v. *N.M. Thomas : (1976)1 SCR 906.* The same was followed per majority in *Akhil Bharatiya Soshit Karamchari Sangh (Rly .)* v. *Union of India: (1981) 1 SCC 246*. It was thus interpreted by this Court that appointment would include promotion.

The reservation for Scheduled Castes and Scheduled Tribes in contradistinction to the rest of the Indian community and others are classified to accord fundamental right of equality of opportunity to the Scheduled Castes and Scheduled Tribes for the purpose of adequate representation in the services under the State. In *Indra Sawhney* v. *Union of India : (1992) Supp. 3 SCR 217*, a larger Bench of nine Judges per majority, in which A.M. Ahmadi, J. (as he then was) did not participate on the

issue since it did not directly arise for decision therein, held that reservation of appointment or post under Article 16(4) is confined to initial appointment only and cannot extend to provide reservation in matters of promotion. However, this Court upheld the promotions made until the date of the judgment, namely, 16-11-1992 and held that wherever special rules have not provided reservation in appointment by promotion, the same was permitted to be done within 5 years from that date. Parliament amended Article 16 by 77th Constitution (Amendment) Act, 1995 which came into force from 17-6-1995 incorporating clause 4-A to Article 16 which reads thus:

"Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

Parliament by amending the Constitution and introducing Article 16(4-A) has removed the base as interpreted by this Court in *Indra Sawhney Vs. Union of India: (1992) Suppl. 3 SCR 217* that appointment does not include promotion by making express provisions that when the State forms an opinion that members of the Scheduled Castes or Scheduled Tribes are not adequately represented in any service or to any class or classes of base in the service under the State, the State is empowered to make provisions for reservation by promotion. Article 16(1) does not prevent the State from making such a provision. In *Indra Sawhney Vs. Union of India: (1992) Suppl. 3 SCR 217 case* 4 also, this Court reiterated that right to equality under Article 16(1) is equally applicable to the Scheduled Castes and Scheduled Tribes and Article 16(4) is not an exception. Reservation is part of the scheme of equality under Article 16(1). **Article 16(4-A) would establish that the interpretation put up in General Manager, Southern Railway Vs. *Rangachari : (1962) 2 SCR 586, State of Kerala Vs. N.M. Thomas : (1976) 1 SCR 906* and Akhil Bharatiya Soshit Karamchari Sangh (Railway) Vs. Union of India: (1981)1 SCC 246 received parliamentary approval. It would thus be clear that as a principle of law, rule of reservation can apply not only to initial recruitment but also in promotions where the State is of the opinion that Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in class or classes of service under the State.** It is seen that Rule 22 of the General Rules provides reservation for appointment by direct recruitment. By constitutional parameters and interpretation of law by this Court, reservation under Articles 16(1), 16(4) and 16(4-A) would include reservation in promotion as well……." (emphasis supplied).

It is true that in **G. Sethumadhava Rao**[1] the Supreme Court had held that, since Rule 22 of the A.P. State Subordinate Service

rules provides for appointment by direct recruitment, by constitutional parameters and interpretation of law by the Supreme Court, reservation under Article 16(1), 16(4) and 16(4-A) include reservation in promotion as well. It is also necessary in this context to refer to **M. Nagaraj Vs. Union of India**[6], wherein the Constitution Bench of the Supreme Court observed:-

*"……**Equity, justice and merit***

The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. **In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution……**

……..Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. **Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated**

above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise….

……**Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons— "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II) Vs. State of Punjab: 1999(7) SCC 209* this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.**

……**Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation"……..**

"…….**The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests.** If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim

seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (see *Affirmative Action* by William Darity). **If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions.** As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions……"

"…….Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is—whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.

In conclusion, we reiterate that the object behind the impugned constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above. …

"……**The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency.** It is made clear that even if the State has reasons to make reservation, as

stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.

".....In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. **As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335.** It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely....." (emphasis supplied).

The law laid down, by the Constitution Bench of the Supreme Court, in **M. Nagaraj**[6], is that Article 16(4-A) is an enabling provision and the State is not bound to make provision for reservation in favour of the scheduled castes and scheduled tribes in matters of promotion and, if it exercises its discretion to make such a provision, the State has, in addition to compliance with Article 335, to be satisfied regarding inadequacy of representation of the scheduled castes in public employment. Since Article 16(4-A) has been held in **M. Nagaraj**[6] to be an enabling provision, and all other judgments have to be read in the light of the pronouncement of the Constitution Bench of the Supreme Court, it is not for this Court to issue a mandamus directing HACA to apply the rule of reservation in matters of promotion. (**Ajit Singh II Vs. State of Punjab**[7])

The fact, however, remains that HACA has earmarked four posts in the cadre of senior assistants, to be filled up by direct

recruitment of the scheduled castes and the scheduled tribes, which posts have remained unfilled for the past nearly a decade and a half. Respondents have not contended, nor could any such contention have been raised in the facts and circumstances of the present case, that there is adequate representation of the scheduled castes in the cadre of senior assistants in HACA. Nothing more need be said in this regard except to note that from out of the sanctioned strength of 16 posts of Senior Assistants, twelve of which have been filled up, there is not even a single member from either the scheduled castes or the scheduled tribes. The very fact that four posts have been earmarked in their favour would reveal that HACA itself considers their representation to be inadequate. The only reason put forth in justification for not considering the case of the petitioner, for appointment to the post of senior assistant, is that the HACA service rules do not provide for reservation in promotion. While this Court, would refrain from issuing a mandamus to the respondents to amend its service rules and make necessary provision for reservation even in promotion, consistent with Article 16(4-A) of the Constitution and Rule 22 of the A.P. State and Subordinate Rules, it is duty bound to remind the respondents of their constitutional obligations under Article 46 of the Constitution to promote, with special care, the economic interests of the scheduled castes and to protect them from social injustice and all forms of exploitation.

Ends of justice would be met if the respondents are directed to examine the feasibility of making necessary amendment to its service rules providing for reservation in promotion consistent with

its constitutional obligations in this regard, more so, in the light of the fact that the State Government whose rules HACA has proclaimed, under Rule-4 of its Service Rules, to follow from time to time, has made provision for reservation in matters of promotion. In case a decision is taken by the respondents to make such a provision, the petitioner's case shall be considered for promotion to the post of senior assistant provided, of course, he satisfies the eligibility criteria prescribed for promotion to the said post. Since there is not even a single scheduled caste employee in the senior assistants cadre of HACA, and as the four posts earmarked in their favour lie unfilled for the past nearly 15 years, it is necessary that a time frame be fixed. The entire exercise in this regard shall, therefore, be completed within a period of four months from the date of receipt of a copy of this order.

The writ petition is disposed of accordingly. However, in the circumstances, without costs.

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Date: .04.2007 RAMESH RANGANATHAN, J

Note: L.R. Copy to be marked

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[1] 1996(1) SLR 762

[2] 1986 ALT Short Notes 30 – judgment in W.P.14119 of 1984 dated 22.11.1985

[3] 2002 Delhi Law Times 435

[4] (2002)5 SCC 111

[5] (2005)4 SCC 649

[6] (2006) 8 SCC 212

[7] (1999)7 SCC 209